Filed 6/27/19 Schildknegt v. Air and Liquid Systems Corp. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BRIGITTE SCHILDKNEGT, Individually and as successor in interest to NICOLAAS SCHILDKNEGT, Plaintiff and Appellant, v. AIR AND LIQUID SYSTEMS CORPORATION et al., Defendants and Respondents.	B255135 (Los Angeles County Super. Ct. No. BC503723)

APPEAL from judgments of the Superior Court of Los Angeles County, Amy D. Hogue and Patrick T. Madden, Judges. Reversed and remanded.

Weitz & Luxenberg, Benno Ashrafi, Cindy Saxey and Josiah Parker for Plaintiff and Appellant.

Gordon & Rees, Michael J. Pietrykowski, Don Willenburg, and Christopher D. Strunk for Defendant and Respondent, Air & Liquid Systems Corporation.

Horvitz & Levy, Jason R. Litt, Emily V. Cuatto; Foley & Mansfield, Douglas G. Wah and Melissa M. Corica for Defendant and Respondent, Parsons Corporation.

Degani & Galston, Steven Crane; Foley & Mansfield, Thomas J. Tarkoff and Lauren C. McLeod for Defendant and Respondent, Fluor Corporation and Fluor Enterprises, Inc.

Nicolaas and Brigitte Schildknegt asserted claims for negligence and strict products liability, together with several related claims, against respondents, alleging that they were responsible for Nicolaas Schildknegt's exposure to asbestos and resulting mesothelioma. Prior to trial, the court (Judge Amy D. Hogue) granted summary judgment on the Schildknegts' claims in favor of respondent Air & Liquid Systems Corporation, as successor to Buffalo Pumps, Inc. (Buffalo). At trial, the court (Judge Patrick T. Madden) granted a nonsuit on the Schildknegts' claims in favor of respondents Parsons Corporation (Parsons), Fluor Corporation (Fluor), and Fluor Enterprises, Inc. (Fluor Enterprises).

Appellant Brigitte Schildknegt challenges the rulings on the motion for summary judgment and motions for a nonsuit.[1] We reverse the grant of summary judgment in favor of Buffalo and the grant of a nonsuit in favor of Parsons, Fluor, and Fluor Enterprises.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Beginning in the 1960's, Nicolaas Schildknegt was employed as a pipefitter at several locations in California. After a six-month period of employment at Todd Shipyards in San Pedro, he worked at a Gulf Oil refinery in Santa Fe Springs from 1966 or 1967 to approximately 1972, and then found a position at a Lever Brothers plant, where he worked until the early 1990's.[2] In 2012, he was diagnosed with mesothelioma.

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[1] During the pendency of this appeal, Nicolaas Schildknegt died. For purposes of the appeal, Brigitte Schildknegt has been designated his successor in interest.

[2] There is a conflict in the record regarding the location of the Lever Brothers plant. In opposing Buffalo's summary judgment motion, the Schildknegts stated that the plant was in the City of Industry; at trial,

In March 2013, the Schildknegts initiated the underlying action against respondents and other defendants, asserting claims for negligence, strict liability, premises liability, breach of warranty, and loss of consortium. The claims were predicated on allegations that Nicolaas's mesothelioma resulted from his exposure to asbestos attributable to the defendants' products, premises, or work as contractors. The Schildknegts requested compensatory and punitive damages.

In September 2013, Buffalo sought summary judgment on the Schildknegts' claims against it, which relied primarily on the theory that Nicolaas encountered asbestos while working with, or near, Buffalo's products at Todd Shipyards, the Gulf Oil refinery, and the Lever Brothers plant. Buffalo's principal contention was that the Schildknegts could not demonstrate the element of causation because they lacked evidence that Nicolaas was exposed to asbestos attributable to Buffalo. Additionally, Buffalo offered affirmative evidence that Nicolaas was not exposed to asbestos from any products it supplied. The trial court (Judge Hogue) granted summary judgment, concluding that Buffalo's showing shifted the burden to the Schildknegts to demonstrate triable issues regarding causation, which they failed to do.

In November 2013, a jury trial commenced on the Schildknegts' claims against several defendants, including respondents Parsons, Fluor, and Fluor Enterprises. Regarding respondents, the Schildknegts asserted a negligence claim predicated on the theory that Nicolaas was exposed to asbestos when respondents performed work as independent contractors at his jobsites. Following the Schildknegts' case-in-chief, Parsons, Fluor, and Fluor Enterprises sought a nonsuit on the claims against them. The trial court (Judge Madden) granted a nonsuit, concluding there was insufficient evidence that Nicolaas was exposed to asbestos attributable to respondents' activities at his workplaces. Later, the jury returned verdicts in favor of the then-remaining defendants on the Schildknegts' claims against them.

Nicolaas identified its location as the City of Commerce. We note that the parties also sometimes refer to the plant as a "Unilever" facility.

In January 2014, judgments were entered in favor of respondents and against the Schildknegts on their claims. This appeal followed.

DISCUSSION

For the reasons discussed below, we conclude the trial courts erred in granting summary judgment in favor of Buffalo and in granting a nonsuit in favor of Parsons, Fluor, and Fluor Enterprises.

A. *Summary Judgment*

1. *Governing Principles*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

Although we independently assess the grant of summary judgment (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819), our inquiry is subject to certain constraints. Under the summary judgment statute, we examine the evidence submitted in connection with the summary judgment motion, with the exception of evidence to which objections have been appropriately sustained.[3] (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711; Code Civ. Proc., § 437c, subd. (c).) Furthermore, our review is limited to contentions adequately raised in appellant's briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126).

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[3] The parties asserted numerous evidentiary objections to the showing proffered by their respective adversaries, which the trial court sustained in part and overruled in part. As appellant has not contested those rulings on appeal, she has forfeited any contention of error regarding them. To the extent Buffalo challenges the rulings, we discuss them below (see pts. A.7.b.i. & A.7.b.ii., *post*).

2. *Buffalo's Summary Judgment Motion*

Buffalo's motion for summary judgment attempted to show that the Schildknegts' claims were defective with respect to the element of causation. Buffalo's key target was an aspect of causation required for all the claims, namely, exposure to asbestos attributable to Buffalo. As discussed further below (see pt.B.2., *post*), "[a] threshold issue in asbestos litigation is exposure to the relevant asbestos product. [Citations.] 'If there has been no exposure, there is no causation.' [Citation.]" (*Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236 (*Casey*), quoting *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103 (*McGonnell*).)[4]

Buffalo challenged the Schildknegts' ability to establish the requisite threshold exposure in two distinct ways. Generally, on summary judgment, defendants may carry their initial burden of production by providing adequate evidence that the plaintiff's claims have no merit. (*Aguilar*, *supra*, 25 Cal.4th at pp. 843, 854-855.) That lack of merit can be shown by two methods. (*Id.* at pp. 853-854.) The defendant may try to "conclusively negate" some "element X" essential to the plaintiff's claims, that is, directly attempt to "prove not X." (*Ibid.*, italics omitted.) Alternatively, the defendant may try to show that the plaintiff cannot prove element X, that is, demonstrate "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" of element X. (*Id.* at p. 854.)

Buffalo employed both methods in an effort to demonstrate deficiencies regarding the requisite threshold exposure to asbestos. Buffalo offered affirmative evidence that Nicolaas never encountered asbestos from products it supplied. Furthermore, Buffalo sought to demonstrate that the

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[4] In seeking summary judgment, Buffalo also asserted specific attacks on particular causes of action predicated on grounds other than the element of causation. However, the trial court granted summary judgment solely on the basis of Buffalo's causation-related contentions, and on appeal, Buffalo has not suggested that the supplementary attacks could independently support the grant of summary judgment. Accordingly, the focus of our inquiry is on the trial court's rationale for the grant of summary judgment. (See Code Civ. Proc., § 437c, subd. (m)(2).)

Schildknegts did not possess, and could not reasonably obtain, evidence needed to establish exposure to asbestos attributable to Buffalo.

The second method used by Buffalo is subject to demanding requirements. In order to demonstrate the lack of necessary evidence, a defendant must do more than "simply point out" a purported deficiency in the plaintiff's evidence (*Aguilar*, *supra*, 25 Cal.4th at p. 854); the burden on summary judgment does not shift to the plaintiff unless a "stringent review of the direct, circumstantial and inferential evidence" shows that the plaintiff inherently lacks the evidence in question (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83 (*Scheiding*)). Thus, the defendant will ordinarily satisfy its initial burden on summary judgment only through "admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing" (*Aguilar, supra*, at p. 855), or through discovery responses that are factually devoid (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590).

Generally, the responses upon which the defendant relies must reply to discovery requests that are sufficiently comprehensive, or sufficiently focused on key elements of the plaintiff's claims, to support the reasonable inference that the plaintiff cannot marshal needed evidence. Thus, in *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 103, 106-107 (*Andrews*), which involved an asbestos-based personal injury action, the appellate court affirmed summary judgment in favor of a manufacturer of asbestos-containing products, concluding that the plaintiff's evasive responses to broad discovery requests seeking the factual basis of his claims and identities of relevant witnesses showed that he could not establish causation. Again, in *McGonnell*, which also involved an asbestos-based personal injury action, the appellate court concluded the defendant carried its initial burden on summary judgment by showing that when deposed, the plaintiff admitted he was familiar with the defendant's products and could not recall seeing them at his jobsites. (*McGonnell*, *supra*, 98 Cal.App.4th at pp. 1104-1105.)

In contrast, when the pertinent discovery is insufficiently comprehensive or focused, summary judgment is not properly ordered in the defendant's favor. In *Scheiding*, a worker asserted asbestos-related personal injury claims against numerous defendants, including a general contractor.

(*Scheiding*, *supra*, 69 Cal.App.4th at pp. 67-68.) The general contractor successfully sought summary judgment on the ground that the worker, testifying in deposition and responding to form interrogatories, did not specifically name the general contractor as active at any jobsite where the worker encountered asbestos. (*Ibid*.) Reversing, the appellate court concluded the general contractor failed to carry its initial burden, as its counsel directed no questions to the worker during his deposition, and propounded no discovery specifically designed to elicit whether the worker possessed evidence regarding the general contractor. (*Id*. at pp. 83-84.)

3. *Buffalo's Showing*

a. *The Schildknegts' Purported Lack of Evidence*

In attempting to show that the Schildknegts lacked needed evidence relating to Nicolaas's asbestos exposure, Buffalo placed special emphasis on testimony from his June 2013 deposition, approximately three months before Buffalo filed its motion for summary judgment. According to Buffalo, Nicolaas's testimony was critical because he was the Schildknegt's "sole product identification witness against Buffalo." When deposed, Nicolaas stated that he worked as a pipefitter and welder, and saw pumps made by Buffalo in at least one location, namely, Todd Shipyards. He had no training regarding the internal parts of pumps, never read a Buffalo maintenance manual, and never personally repaired pumps at his job sites, although he was present when others performed such work. He did not know the age or history of the pumps repaired or maintained in his presence at any site, including Todd Shipyards, Gulf Oil refinery, and the Lever Brothers plant. Additionally, he never saw Buffalo personnel at his jobsites, and never visited Buffalo's manufacturing facilities.

Buffalo also pointed to the Schildknegts' June 2013 responses to special interrogatories that sought "all facts" or evidence supporting Nicolaas's alleged exposure to asbestos attributable to Buffalo.[5] Buffalo asserted that

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[5] In seeking summary judgment, Buffalo submitted the Schildknegts' June 2013 responses to two sets of interrogatories, one set of requests for admissions, and one set of requests for production of documents. We note that those responses contain a claim apparently inconsistent with Nicolaas's deposition testimony, specifically, that "[d]uring his pipefitting work, he was

the responses were "devoid of facts establishing that [Nicolaas] was exposed to any asbestos-containing gaskets, packing or external insulation placed on or near Buffalo equipment."

According to the "all facts" responses, at Todd Shipyards, the Gulf Oil Refinery, and the Lever Brothers plant, Nicolaas was exposed to asbestos through the activities of others working with products attributable to Buffalo, including pumps and asbestos-containing gaskets and packing used in the pumps. Those workers released asbestos dust when they removed the original asbestos-containing gaskets and packing in the pumps and installed new asbestos-containing replacements. Additionally, the responses asserted that from the 1930's to the 1980's, Buffalo made pumps -- "mostly centrifugal pumps" -- using asbestos-containing gaskets and packing as internal parts, and that its service manuals described how to replace those parts without warning of the hazards relating to asbestos. The responses predicated that assertion on deposition testimony from Martin Kraft, a Buffalo vice-president designated as its person most knowledgeable.

b. *Nonexposure to Asbestos Attributable to Buffalo*

In order to show that Nicolaas was not exposed to asbestos from Buffalo products, Buffalo submitted declarations from Kraft and retired United States Navy Rear Admiral Roger B. Horne, Jr. Kraft stated (1) that Buffalo did not manufacture gaskets, packing, or insulating material, and (2) that Buffalo had no records indicating that it "rebranded or otherwise placed its name on replacement gaskets or packing it sold to the United States Navy or any of [Nicolaas's] civilian jobsites." Horne stated that Todd Shipyards, at which Nicolaas worked in the 1960's, serviced civilian and United States Navy ships. According to Horne, pumps supplied to the Navy were required to meet Navy specifications, which determined the composition of internal parts such as gaskets and packing, including their asbestos content. The United States Navy's normal procedure was to order replacement gaskets and packing in large quantities from manufacturers dedicated to those products, rather than from pump manufacturers. United States Navy

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often required to repair and maintain . . . asbestos-containing Buffalo pumps." As discussed further (see pt.A.4., *post*), the Schildknegts abandoned that claim in opposing summary judgment.

personnel generally replaced internal gaskets every four to six years, and replaced internal packing every four to six months.[6]

4. *The Schildknegts' Showing*

In opposing summary judgment, the Schildknegts did not challenge several facts claimed in Buffalo's statement of undisputed material facts. They admitted that Nicolaas was their sole product identification witness against Buffalo. They also admitted that Nicolaas never personally repaired pumps at his jobsites, did not know the age or maintenance history of those pumps, and never visited Buffalo's manufacturing facilities. Relying primarily on Nicolaas's deposition testimony, the Schildknegts nonetheless maintained that he often worked near others engaged in installing replacement parts in Buffalo pumps, and breathed dust created by those activities.

The Schildknegts' principal contention was that Buffalo had failed to carry its initial burden with respect to their purported lack of evidence regarding causation. In support of this contention, they pointed to their amended "all facts" responses to the special interrogatories described above, which were served in late August 2013, shortly before Buffalo filed its summary judgment motion.

The amended "all facts" responses stated that while employed at Todd Shipyards, Gulf Oil Refinery, and the Lever Brothers plant, Nicolaas encountered high temperature pumps made by Buffalo that were connected to steam systems. He knew the identity of the pumps' manufacturer because he saw the name "Buffalo" on them. Nicolaas was present when the pumps' internal gaskets and packing were removed, and when replacement gaskets and packing -- taken from packages labeled "Buffalo" -- were placed in the pumps. That process created dust from the original and replacement parts which Nicolaas breathed. The amended responses specifically asserted that

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[6] Horne further stated that the Navy used some materials that were external to pumps, namely, flange gaskets (which were inserted in joints between pipes and pumps) and insulation (which was wrapped around various systems). Navy specifications set the asbestos content of those materials, "if any." According to Horne, the Navy did not buy flange gaskets and insulation from pump manufacturers.

scraping away the old parts created visible dust, and that the packages of replacement parts released visible dust when they were opened.[7]

The amended responses contended the Buffalo pumps, gaskets, and packing were asbestos-containing for two reasons. They asserted that in other actions, Buffalo acknowledged in discovery that from 1955 to 1985, it sold asbestos-containing pumps -- including centrifugal pumps with asbestos-containing gaskets and packing -- and that its service manuals made specific reference to the use of asbestos-containing gaskets. Furthermore, the responses stated that Captain Francis J. Burger -- whom the Schildknegts identified as an expert witness -- would testify that high temperature pumps connected to steam systems ordinarily incorporated asbestos-containing gaskets and packing, and that service manuals for those pumps usually recommended asbestos-containing replacement parts.

The Schildknegts also denied that Buffalo had carried its initial burden with respect to Nicolaas's nonexposure to asbestos attributable to Buffalo, arguing that Buffalo's showing did not support the reasonable inference that Nicolaas encountered no asbestos-containing Buffalo products at his worksites. They further contended that even if the burden of production had been shifted, there were triable issues whether Nicolaas was exposed to asbestos from Buffalo's products, in view of Nicolaas's deposition testimony and Buffalo's discovery responses in other actions.

Nicolaas testified that at Todd Shipyards, Gulf Oil refinery, and the Lever Brothers plant, he worked near other tradesmen removing and replacing gaskets and packing in Buffalo pumps, and breathed dust created by that process. The packaging for the replacement parts and the pumps themselves bore the name "Buffalo." According to Nicolaas, at the Gulf Oil

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[7] We recognize that the amended responses contain a claim the Schildknegts abandoned in opposing summary judgment, namely, that Nicolaas personally repaired Buffalo pumps. However, the discrepancy between the amended responses and Nicolaas's testimony that he never personally repaired Buffalo pumps provides no support for Buffalo's "no evidence" motion because -- as explained below (see pt. A.7.a., *post*) -- the facts in the amended responses upon which the Schildknegts rely, coupled with Nicolaas's testimony, state an adequate theory of asbestos exposure.

refinery and the Lever Brothers plant, it was customary to use replacement parts from the manufacturer. Buffalo's discovery responses stated that until 1985, some pumps made by Buffalo incorporated asbestos-containing gaskets and packing as original parts. Additionally, Buffalo acknowledged providing gaskets and packing made by others as replacement parts.

5. *Buffalo's Reply*

Buffalo contended that it "ha[d] shifted the burden . . . because it has established . . . that the universe of information relating to [Nicolaas's workplaces] at times during [Nicolaas's] work is devoid of any evidence that Buffalo supplied any replacement gaskets and packing material for any [workplace] at issue in this case." (Italics omitted.) Buffalo further argued that the Schildknegts failed to raise a triable issue regarding the source of the replacement products.

6. *Trial Court's Ruling*

In granting summary judgment, the trial court characterized Buffalo as seeking summary judgment under two different theories: a "no evidence" theory, and a "tried and true" theory. The "no evidence" theory asserted the Schildknegts' own discovery responses demonstrated they lacked evidence to support their claim that Nicolaas had been exposed to asbestos contained in Buffalo pumps or in replacement parts supplied by Buffalo. The second, "tried and true" theory, claimed Buffalo's evidence that it did not manufacture or rebrand replacement gaskets sold to Nicolaas's worksites shifted the burden to the Schildknegts to show he had come into contact with Buffalo-supplied parts.[8] The court concluded (1) the Schildknegts' discovery

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[8] As we discuss further (see p.A.7.b., *post*), in asserting this theory, Buffalo did not suggest the evidence established that any replacement gaskets with which Nicolaas came into contact were free from asbestos; nor did Buffalo suggest the Schildknegts could not make a contrary showing. Indeed, the Schildknegts' discovery responses suggested such evidence was readily available in the form of a declaration from Captain Burger. In any event, the absence of asbestos from replacement parts was not part of Buffalo's "tried and true" theory for summary judgment, which was predicated instead on the Schildknegts' alleged failure to demonstrate proximity to Buffalo-supplied replacement parts. To the extent it was part of Buffalo's "no evidence" theory, as explained above, that theory was properly

responses were not "factually devoid," and thus Buffalo had not shifted the burden in its "no evidence" motion; (2) Buffalo had shifted the burden in its "tried and true" motion, and (3) Buffalo was entitled to summary judgment as the Schildknegts failed to raise a triable issue whether any Buffalo-supplied replacement parts to which Nicolaas was exposed contained asbestos.

7. *Analysis*

For the reasons set forth below, we conclude summary judgment was improperly granted.

a. *"No Evidence" Theory*

In rejecting the "no evidence" theory, the trial court reasoned that Buffalo failed to shift the burden to the Schildknegts because their amended discovery responses were not factually devoid with respect to Nicolaas's alleged exposure to asbestos attributable to Buffalo. We discern no error in that determination.

In *Ganoe v. Metalclad Insulation Corp.* (2014) 227 Cal.App.4th 1577, 1578-1579 (*Ganoe*), the plaintiff asserted a wrongful death claim against an insulation contractor and other defendants, alleging that her husband died from mesothelioma caused by exposure to asbestos in his workplace. The contractor sought summary judgment, contending the plaintiff lacked evidence of asbestos exposure attributable to the contractor. (*Id*. at p. 1580.) According to the contractor's showing, the plaintiff had no evidence that it performed work or supplied materials to her husband's place of employment. (*Ibid*.) Before the plaintiff's opposition to the summary judgment was due, the contractor produced a hitherto undisclosed document showing that, in fact, it had participated in a steam pipe replacement project at the husband's workplace. (*Ibid*.) Although the plaintiff served amended discovery responses reflecting the document and included those responses in its opposition to summary judgment, the trial court granted summary judgment in the contractor's favor. (*Id*. at p. 1581.) Reversing, the appellate court determined that the contractor failed to carry its initial burden, concluding that the "all facts" response contained "'specific facts' showing that [the

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rejected by the trial court, and Buffalo "does not contest that [ruling] for purposes of this appeal."

contractor] had exposed [the decedent] to asbestos . . . by removing asbestos-containing insulation in [the decedent's workplace] while he was present." (*Id*. at p. 1584.)

In view of *Ganoe*, the trial court properly denied the "no evidence" motion on the basis of the Schildknegts' amended "all facts" responses. As noted in *Ganoe,* it would be inequitable to permit Buffalo to carry its initial burden by excluding the amended responses, which were served before Buffalo filed its summary judgment motion. Furthermore, those responses, together with Buffalo's other evidence, suffice to show that the Schildknegts had evidence of specific facts demonstrating Nicolaas's asbestos exposure. When deposed, Nicolaas stated that he was present when other tradesmen repaired pumps at his jobsites. According to the amended "all facts" responses, Nicolaas saw that some pumps had the name "Buffalo" on them, as did the packaging for the replacement gaskets and packing installed in those pumps during the repair process, which created dust that Nicolaas breathed. The responses further asserted that in discovery, Buffalo admitted that from 1955 to 1985, it sold asbestos-containing pumps, and that the Schildknegts' expert, Captain Burger, would testify that pumps of the type encountered by Nicolaas usually required asbestos-containing gaskets and packing. The trial court thus correctly concluded that the "no evidence" motion failed.

b. *"Tried and True" Theory*

In granting summary judgment based on Buffalo's "tried and true" theory, the trial court concluded Buffalo shifted the burden to the Schildknegts to raise triable issues whether any Buffalo-supplied replacement parts at Nicolaas's workplaces contained asbestos, and the Schildknegts failed to do so. As explained below, we conclude Buffalo's showing was insufficient to carry its initial burden.

i. *Failure to Shift Burden*

When a defendant seeks summary judgment, the plaintiff is not obliged to respond with evidence supporting its claims until the defendant adequately claims "undisputed facts which, if left uncontradicted[,] would be sufficient to warrant a judgment in his favor." (*Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 478.) If the complaint pleads multiple theories,

the burden does not shift to the plaintiff unless the defendant shows that "'there are no material facts requiring trial on any of them.'" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 163, quoting *Hufft v. Horowitz* (1992) 4 Cal.App.4th 8, 13.)

Here, the complaint asserts several theories regarding Buffalo's liability for Nicolaas' exposure to asbestos. Ordinarily, in a product-based personal injury action, "'[r]egardless of the theory which liability is predicated upon, whether negligence, breach of warranty, strict liability in tort, or other grounds, . . . to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product.'" (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874, quoting 51 A.L.R.3d 1344, 1349; accord, *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 677 (*DiCola*).) The complaint predicates the claims for negligence, strict liability, and breach of warranty against Buffalo on allegations that it was responsible -- in at least one of several enumerated alternative ways -- for the asbestos-containing products that Nicolaas encountered.

The trial court found Buffalo's admissible evidence showed only that it did not manufacture (or rebrand) gaskets, packing or insulation; that evidence did not eliminate the possibility that Buffalo played a role in supplying such replacement parts to the jobsites where Nicolaas worked. Nevertheless, the court concluded Buffalo had shifted the burden to the Schildknegts to demonstrate that any such Buffalo-supplied parts contained asbestos. It then found they had failed to do so. The court stated: "While [Nicolaas's] testimony -- that he observed workers use replacement gaskets and packing that came in 'Buffalo' packages [] -- provides circumstantial evidence sufficient to raise a triable issue . . . whether [Buffalo] supplied parts to the sites where [Nicolaas] worked . . . , the testimony is insufficient to defeat [Buffalo's] motion in light of the absence of evidence showing that the replacement gaskets and packing contained asbestos."

In our view, the trial court erred in ruling that Buffalo shifted the burden to the Schildknegts, as its showing failed to demonstrate the nonexistence of triable issues regarding every theory pleaded in the

complaint. The complaint's claim for strict products liability asserts that Buffalo, inter alia, "distributed, supplied, . . . offered for sale, [or] marketed" asbestos-containing products.[9] Despite Buffalo's proffered evidence that it neither manufactured nor rebranded replacement pump gaskets and packing for sale to Nicolaas's workplaces, it did not deny acting as a supplier of replacement parts -- that is, as an intermediary between the manufacturers of the parts and the ultimate seller of the parts -- or otherwise exclude the possibility that parts it supplied were used at Nicolaas's workplaces.[10]

Furthermore, to the extent Buffalo successfully shifted the burden to the Schildknegts to demonstrate Nicolaas was exposed to Buffalo-supplied replacement parts, the Schildknegts offered evidence sufficient to defeat summary judgment. As the court correctly recognized, the Schildknegts' evidence that Nicolaas saw replacement parts in Buffalo-labeled packages was sufficient to raise a triable issue of fact whether Buffalo supplied such parts to the relevant workplaces.

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[9] Generally, the doctrine of strict products liability applies to all parties integrally involved in the vertical distribution of products, such as manufacturers, wholesalers, and retailers. (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 772-773.) Thus, "[i]n a product[s] liability action, *every* supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, is potentially liable." (*Edwards v. A.L. Lease & Co.* (1996) 46 Cal.App.4th 1029, 1033, italics added.)

[10] On a related matter, we note that Buffalo's brief erroneously states that the trial court admitted two items of evidence potentially bearing on whether Buffalo acted as a supplier that the court, in fact, excluded. Those items are a portion of Kraft's declaration and a declaration from Michael Formoso, an information analyst employed by Chevron U.S.A. Inc. (Chevron). Kraft stated that after a search of Buffalo's records, he found no documents showing sales of Buffalo's "equipment" to two of Nicolaas's jobsites, the Gulf Oil facility and the Unilever plant; Formosa stated that after a search of Chevron's records, he found no pertinent documents relating to Nicolaas's work at the Gulf Oil facility. To the extent Buffalo may suggest the evidence should have been admitted, it is unnecessary to address that contention, as nothing in the excluded evidence shows that Buffalo was not an intermediary in the chain of distribution of the replacement parts.

As to the content of the replacement parts, Buffalo neither claimed as an undisputed fact that replacement parts (if any) attributed to it were asbestos-free, nor offered evidence in support of that claim. Rather, Buffalo's "tried and true" theory was predicated on its assertion that Buffalo had not supplied replacement gaskets and packing to Nicolaas's workplaces -- a claim as to which the trial court properly found triable issues of fact. Unsurprisingly, in responding to the "tried and true" theory, the Schildknegts offered no evidence that the replacement parts at Nicolaas's workplaces contained asbestos, even though their amended discovery responses stated that their expert witness, Captain Burger, could provide such evidence. In short, nothing in Buffalo's motion shifted the burden to the Schildknegts to prove that any Buffalo-supplied replacement gaskets and packing used at his jobsites contained asbestos. Accordingly, Buffalo was not entitled to summary judgment.

ii. *No Inadmissible Hearsay*

Buffalo contends the trial court incorrectly overruled its hearsay objection to Nicolaas's testimony that he saw workers remove and use replacement parts from bags labeled "Buffalo." The court concluded that Nicolaas's testimony constituted nonhearsay circumstantial evidence of the source of those replacement parts. We review that ruling for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)[11] As explained below, we discern no error.

Generally, application of the hearsay rule requires evidence of a statement "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Thus, nonassertive conduct is not regarded as hearsay. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068.) Furthermore, even when the evidence concerns an utterance whose meaning bears on the fact to be proved, that utterance need not fall under the hearsay rule when the manner

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[11] Among appellate courts, there is an unresolved division of opinion regarding the standard of review for the trial court's evidentiary rulings on summary judgment (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535). We follow the weight of authority and apply the abuse-of-discretion standard. (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 8.168, pp. 8-146-8-147.)

in which it is "offered" -- that is, the specific inferential connection between the utterance and the target fact -- does not hinge on the utterance's status as a statement. As Witkin explains, "[f]requently, an utterance may justify an inference concerning a fact in issue, regardless of the truth or falsity of the utterance itself. It is admitted as *circumstantial evidence* of that independent fact. The distinction between these two uses of the evidence is not always readily apparent." (1 Witkin, Cal. Evid. (2018 5th ed.) Hearsay § 37, p. 831.)

When an object bears a word or symbol characteristic of a party, the presence of the word or symbol on an object, together with other facts, may constitute circumstantial evidence of a relationship between the object and the party. So used, the words or symbols are sometimes denominated "'mechanical traces.'" (1 Witkin, *supra*, Circumstantial Evidence, § 136, at pp. 548-549.) Thus, in *Brown-Forman Distillers Corp. v. Walkup Drayage & Warehouse Co.* (1945) 71 Cal.App.2d 795, 798, the appellate court concluded evidence that a truck bore the defendant's business name and displayed colors distinctive of the defendant's trucks sufficed to show the defendant owned the truck.

The use of a name or symbol on an object as circumstantial evidence of a relationship falls outside the hearsay rule when the evidence, viewed as a totality, requires no intrinsic employment of the name or symbol as a statement. In *People v. Williams* (1992) 3 Cal.App.4th 1535, 1537 (*Williams*), police officers executed a search warrant relating to an apartment, found contraband and three documents bearing the defendant's name, viz., a fishing license, a check, and a paycheck. When the defendant challenged the warrant, the trial court ruled that the documents constituted inadmissible hearsay evidence that the defendant was the apartment's tenant, and thus found the defendant lacked standing to attack the warrant. (*Id.* at p. 1541.)

Reversing, the appellate court concluded the defendant's showing required no reliance on an implied statement in the bills that he was the apartment's possessor. (*Williams*, *supra*, 3 Cal.App.4th at p. 1541) The court explained that when found in a residence, a document bearing a person's name is circumstantial evidence that the residence belongs to the person -- even when the document lacks the residence's address -- if the document is "more likely to be found in the residence of the person named than in the

residence of any other person. . . . The nature of the item, coupled with the name it bears, is sufficient to give rise to the inference that the person named resides in that place." (*Id.* at p. 1542.) Because the documents found in the apartment were of that type, the court concluded they were admissible to show the defendant was the apartment's tenant. (*Ibid.*) The court stated: "[R]egardless of the truth of any express or implied statement contained in those documents, they are circumstantial evidence that a person with the same name as the defendant resided in the apartment from which they were seized. Therefore, . . . they are admissible nonhearsay evidence." (*Id.* at pp. 1542-1543; see also *Rogers v. Whitson* (1964) 228 Cal.App.2d 662, 675 [bills were admissible as nonhearsay circumstantial evidence of relationship of owner and independent contractor]; *People v. Reifenstuhl* (1940) 37 Cal.App.2d 402, 405 [police officer's evidence that he entered defendant's office and conducted phone conversation with unknown caller trying to make bets was nonhearsay circumstantial evidence that defendant ran illegal betting business].)

Federal courts have also concluded a distinctive name or symbol on an object may constitute nonhearsay circumstantial evidence of its origin or owner. In *Los Angeles News Service v. CBS Broadcasting, Inc.* (9th Cir. 2002) 305 F.3d 924, 929, as amended 305 F.3d 924, a newsgathering service alleged that a television network used a proprietary news video recording without permission. The trial court excluded the video recording on the ground that its introductory identifying "slate" was hearsay. (*Id.* at p. 930.) The Ninth Circuit concluded that ruling was erroneous, stating the slate was "most appropriately characterized as circumstantial evidence of origin, rather than as an 'assertion' within the meaning of the hearsay rule." (*Id.* at p. 935; see also *United States v. Alvarez* (9th Cir. 1992) 972 F.2d 1000, 1004 [inscription "Garnika, Spain" on gun was nonhearsay circumstantial evidence of gun's place of manufacture], disapproved on another ground in *Kawashima v. Mukasey* (9th Cir. 2008) 530 F.3d 1111, 1116; *United States v. Snow* (9th Cir.1975) 517 F.2d 441, 443 [tape bearing defendant's name attached to a briefcase was "'mechanical trace'" constituting nonhearsay circumstantial evidence of ownership].)

Viewed in the context of the Schildknegts' showing, Nicolaas's testimony that he saw workers use replacement parts from bags labeled "Buffalo" is reasonably regarded as circumstantial evidence of the source of the parts, rather than hearsay evidence of that fact, construing the labels as assertions. As Buffalo's discovery responses admitted it provided replacement parts for its pumps, Nicolaas's testimony addressed a narrow factual question, namely, whether some of those replacement parts found their way to Nicolaas's workplaces. Because manufacturers commonly place their names on replacement parts in order to identify them as suitable for their products, the presence of Buffalo's name on the labels Nicolaas saw was circumstantial evidence of their source. Accordingly, the trial court did not err in overruling Buffalo's hearsay objection.

Buffalo contends Nicolaas's testimony constituted inadmissible hearsay, relying on *DiCola*, *supra*, 158 Cal.App.4th 666. There, a motorcyclist died as the result of a defective stand on his motorcycle, which lowered itself as he rounded a curve. (*Id.* at p. 669) In the subsequent products liability action, the plaintiffs alleged that the stand had been made by a manufacturer and marketed by a distributor. (*Ibid.*) The defendants sought summary judgment and submitted evidence that they neither manufactured nor distributed the defective stand. (*Ibid.*) In an effort to create triable issues, the plaintiffs offered declarations from experts stating that the defective stand was identical to a sample stand, and a declaration from plaintiffs' counsel stating that the sample stand's packaging and instructions bore the brand name of a stand made and distributed by the defendants. In granting summary judgment, the trial court ruled the lawyer's statements were inadmissible hearsay. (*Id.* at p. 673.) Affirming, the appellate court agreed. (*Id.* at pp. 680-681.)

We do not find *DiCola* persuasive on the issue before us, as it contains no discussion of the possibility that the brand name on the packaging and instructions constituted nonhearsay circumstantial evidence of the sample stand's source. To the extent *DiCola* may suggest that the use of such brand name to establish a product's source necessarily amounts to inadmissible hearsay, we disagree for the reasons stated above. Nicolaas's testimony was thus properly admitted over Buffalo's hearsay objection. In view of that

ruling, the Schildknegts established triable issues sufficient to foreclose summary judgment.

B. *Nonsuit*

We turn to appellant's contentions regarding the grant of nonsuit in favor of respondents Parsons, Fluor, and Fluor Enterprises.[12] At trial, the Schildknegts' negligence claims against respondents relied on the theory that while Nicolaas worked at the Lever Brothers plant and the Gulf Oil refinery, respondents engaged in activities as independent contractors that exposed Nicolaas to asbestos-containing dust from pipe insulation. The Schildknegts also asserted a negligence claim predicated on such a theory against Sequoia Ventures Inc., formerly known as Bechtel Corporation (Bechtel).[13] Following the presentation of the Schildknegts' case-in-chief, respondents and Bechtel sought a nonsuit on several grounds. The trial court granted a nonsuit, concluding that the Schildknegts offered insufficient evidence that respondents and Bechtel were responsible for Nicolaas's exposure to asbestos. For the reasons set forth below, we reverse that ruling.

1. *Standard of Review*

"'A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.' [Citation.] In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff's claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit. [Citation.]" (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541, quoting *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) We review rulings on motions for a nonsuit de novo,

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[12] For simplicity, in discussing the grant of nonsuit, we generally refer to these parties as "respondents."

[13] After appearing in this appeal, Bechtel entered into a settlement with appellant and was dismissed as a respondent.

applying the same standard that governs the trial court. (*Saunders v. Taylor*, *supra*, at pp. 1541-1542,& fn. 2.)

2. *Governing Principles*

The principal issues before us concern the causation of Nicolaas's mesothelioma. Generally, in cases "presenting complicated and possibly esoteric medical causation issues," the plaintiff is obliged to establish ""'a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to [the] plaintiff's injury.'"" (*Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79, quoting *Rutherford v. Owen-Illinois, Inc.* (1997) 16 Cal.4th 953, 976, fn. 11 (*Rutherford*).) California applies the substantial factor test to so-called "cause-in-fact" determinations.[14] (*Rutherford, supra*, 16 Cal.4th at p. 968.)

The leading decision regarding the application of these principles in asbestos cases is *Rutherford*. There, the wife and daughter of a deceased metal worker sued numerous manufacturers and distributors of asbestos-laden products, alleging that the metal worker's exposure to their products caused his fatal lung cancer. (*Rutherford*, *supra*, 16 Cal.4th at pp. 958-959.) Following the first phase of a bifurcated trial, after a jury found the decedent's inhalation of asbestos fibers caused his cancer, all but one manufacturer settled with the plaintiffs. (*Id*. at p. 960.) During the second phase of trial, the jury heard testimony that the metal worker labored in confined areas of ships containing the manufacturer's asbestos-laden

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[14] Under the "substantial factor" standard, "a cause in fact is something that is a substantial factor in bringing about the injury. [Citations.] The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. [Citations.] The substantial factor standard, however, has been embraced as a clearer rule of causation -- one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact. [Citations.]" (*Rutherford*, *supra*, 16 Cal.4th at pp. 968, 969.) Although the term "'substantial factor'" has no authoritative definition, a force that "plays only an 'infinitesimal' or 'theoretical' part in bringing about injury" is not a substantial factor. (*Id*. at p. 969.)

insulation. (*Id*. at p. 961.) The parties also presented expert testimony regarding asbestos-related cancers. (*Ibid*.) After receiving a burden-shifting instruction that the manufacturer had the burden of showing its product did not cause the decedent's cancer, the jury allocated the manufacturer a 1.2 percent share of comparative fault. (*Id*. at pp. 961-962.) On appeal, the manufacturer challenged the instruction. (*Id*. at pp. 962-963.)

Our Supreme Court concluded the case fell outside the special circumstances in which a burden-shifting instruction on causation is appropriate, notwithstanding the "scientifically unknown details of carcinogenesis" and the impossibility of identifying the "'specific fibers'" that caused an individual's cancer. (*Rutherford*, *supra*, 16 Cal.4th at p. 976.) The court determined the burden of proof remained on the plaintiff, subject to a specific quantum of proof. (*Id*. at pp. 969-982.) Under that quantum of proof, plaintiffs may establish causation on the basis of expert testimony regarding the size of the "dose" or the enhancement of risk attributable to exposure to asbestos from the defendant's products. (*Id*. at p. 976, fn. 11.)

To "bridge th[e] gap in the humanly knowable," the court adopted the following standard of proof: "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to [the] defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer." (*Rutherford*, *supra*, 16 Cal.4th at pp. 976, 982-983, fn. omitted.)

The court further held that juries should be so instructed. (*Rutherford*, *supra*, 16 Cal.4th at p. 976.) Turning to the case before it, however, the court found no prejudice from the instructional error. (*Id*. at pp. 983-985.)

3. *The Schildknegts' Case-In-Chief*

As the Schildknegts' showing against respondents was intertwined with their showing against Bechtel, we include pertinent evidence relating to Bechtel in our summary of the Schildknegts' case-in-chief.

a. Nicolaas Schildknegt

In 1936, Nicolaas was born in Holland. At the age of 16, he began working for a company that installed heating systems. In the early 1960's, after living in several countries, he emigrated to the United States, and worked as a welder and pipe fitter at several sites in Southern California, including Todd Shipyards.

In or about 1967, Nicolaas began working at the Gulf Oil refinery as a pipefitter. His job responsibilities included "[a]nything with pipes," including replacing pipes and welds, and fixing leaks. He worked alongside persons with other crafts, including insulators. While working at the refinery, his employer neither warned him regarding the hazards of asbestos-containing materials nor took measures to shield him from those hazards.

In or about 1972, Nicolaas left his position at the Gulf Oil refinery and became employed at the Lever Brothers plant as a pipefitter and welder. The plant made soap, margarine, syrup, and food products. Nicolaas devoted approximately 75 percent of his time to pipefitting and the remainder to welding. Although he never installed insulation, he worked near others doing so. Nicolaas was employed at the Lever Brothers plant until it closed in 1994. According to Nicolaas, Lever Brothers first warned Nicolaas and other workers regarding asbestos-related hazards in the mid-1980's.

While employed at the Gulf Oil refinery and the Lever Brothers plant, Nicolaas often worked alongside employees of outside contractors engaged to replace pipes and install new insulation. Those employees' uniforms displayed the names "Fluor," "Parsons," and "Bechtel." The employees cut away old pipe insulation, installed new insulation, and swept up insulation material while cleaning away debris. Those activities created considerable amounts of dust that Nicolaas breathed. According to Nicolaas, prior to the mid-1980's, the contractors' employees took no protective measures to suppress dust or limit his contact with it, provided no respirator to him, and never warned him that asbestos was hazardous.

b. *Asbestos Exposure Expert Testimony*

Charles Ay, an expert on asbestos exposure, testified that from the 1950's to the early 1970's, insulation in industrial steam and heat systems contained asbestos. There were two basic types of pipe insulation for heat systems: magnesia insulation, which was used in systems with temperatures less than "500 degrees max," and calcium silicate insulation, which was used in systems with higher temperatures. Both types of insulation contained asbestos, and asbestos constituted as much as 15 percent of each type of insulation.[15] Commencing in 1972, asbestos-containing products relating to steam and heat systems were discontinued, and their use was terminated or prohibited.

According to Ay, during the relevant period, asbestos-containing insulation was friable, especially if it was old or dried out. The insulation thus released asbestos dust when it was handled, cut, or replaced. Removing the insulation created "clouds of dust," as did the cleanup process following removal.

Ay further stated that the asbestos-containing insulation was durable. Generally, the insulation outlived the pipes it covered, and was replaced only when a pipe broke. Ay opined that most asbestos-containing insulation remained in place in industrial settings, as there had been no general attempt to abate it.

c. *Medical Expert Testimony*

Dr. James Dahlgren, an expert in toxicology and occupational diseases, testified that asbestos exposure causes mesothelioma. According to Dalhgren, even very low levels of exposure to asbestos -- including short-term exposures -- increase the risk of mesothelioma. Although the lowest level of asbestos exposure capable of causing mesothelioma is probably above "background" – which constitutes a "very low" level of exposure -- its precise amount is unknown.

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[15] On direct examination, Ay stated that calcium silicate insulation was 15 percent asbestos; on cross-examination, he stated that the magnesia insulation he discussed during the direct examination was called "85 magnesia" because it was 15 percent asbestos by weight.

Responding to hypothetical questions, Dr. Dahlgren opined that the types of activity Nicolaas carried out relating to asbestos-containing products enhanced his dose of asbestos, and thus increased his risk of mesothelioma. Dahlgren specifically stated that a person standing near workers engaged in dust-creating activities on asbestos-containing insulation would experience an increased "dose" of asbestos and an increased risk of injury.

According to Dr. Dahlgren, asbestos was linked to asbestosis and other health problems no later than the 1930's. In that decade, California issued an industrial order that identified asbestos dust as "potentially harmful" and recommended a standard for maximum levels of asbestos dust in workplaces, as well as other protective measures. By 1960, medical science had confirmed that asbestos exposure causes mesothelioma. In late 1971, the federal Occupational Health and Safety Administration (OSHA) promulgated asbestos regulations specifying mandatory maximum levels of asbestos exposure.

Arnold R. Brody, a research scientist, testified that to a reasonable degree of medical certainty, it has been established that exposure to asbestos causes mesothelioma. According to Brody, mesothelioma is a "dose-response" disease, and there is no established level of exposure to asbestos above background at which the exposure is safe.

d. *Fluor and Fluor Enterprises*

The Schildknegts offered evidence that in 1924, Fluor was incorporated in California as "Fluor Construction Company." Under several names, Fluor operated as an engineering and construction contractor. In late 1971, Fluor was reorganized as a holding company, and Fluor Enterprises was incorporated in California as a wholly-owned subsidiary of Fluor. After 1971, under several names, Fluor Enterprises was the primary "Fluor" engineering, procurement, and construction entity. At the time of trial, Fluor also owned and controlled several other subsidiaries.

William McKay and Wilton Herbert, who were former project supervisors for various Fluor entities, testified that although "Fluor" tried to be at the forefront of worker safety, it was unaware of the hazards of asbestos until the early 1970's, when the OSHA regulations were promulgated. McKay further stated that in the 1950's and 1960's, "Fluor" engaged in

"refinery maintenance." McKay testified: "Usually when a unit is going to be shut down, the refinery has a hard time getting enough manpower to do the job quickly. And Fluor's role was to rush in there with a full complement of people and do all the work in an expeditious way and enable them to get back on steam right away." According to McKay, "Fluor" probably abandoned refinery maintenance in "the early 1960's."

e. *Parsons*

Stanley Siegler testified that in 1974, when he began his employment with Parsons, it was one of largest engineering and construction companies in the world. Parsons was then aware that asbestos caused lung cancer, and it complied with existing regulations regarding asbestos. Siegler stated that in contracts involving asbestos removal, "[b]asically the procedures that Parsons [specified] were either federal or state OSHA which we . . . almost quoted verbatim."

4. *Trial Court's Ruling*

In granting the nonsuit, the trial court stated: "When the Gulf Oil and the Lever Brothers facilities were built, unquestionably asbestos was used throughout both of these plants for insulation. What is . . . not established by any evidence is whether any or all of the asbestos insulation was replaced at either facility and[] if any asbestos was replaced, when that insulation was replaced and whether the newly installed insulation contained asbestos. . . . In addition, it is not possible to determine whether he was ever exposed to dust that contained asbestos when [respondents] worked at the Gulf Oil and Lever Brother facilities. It would be speculation to say that he was exposed to asbestos dust (or that he was not). No evidence -- no witness and no document -- was presented that showed the nature of any work performed by [respondents] while [Nicolaas] was employed at either of the two facilities."

5. *Analysis*

We conclude the trial court erred in granting the nonsuit. As explained below, there is sufficient evidence that Nicolaas experienced the threshold exposure to asbestos as the result of respondents' activities (see pt.B.5.a., *post*), and no alternative ground supports the nonsuit (see pts.B.5.b.-B.5.d., *post*).

a. *Threshold Exposure*

We find guidance regarding the sufficiency of the evidence to establish the requisite "threshold exposure" from *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1413 (*Lineaweaver*) and *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 664-666 (*Hernandez*). In *Lineaweaver*, an oil refinery worker asserted personal injury claims against an insulation contractor, alleging that his asbestosis resulted from the asbestos-containing insulation the contractor provided to the refinery. (*Lineaweaver*, *supra*, at p. 1413.) The worker contended he encountered asbestos dust when he worked on the insulation and when he worked near other employees repairing or replacing it. (*Ibid.*) At trial, the worker offered evidence that he worked at the refinery from 1950 to 1984, that the contractor performed 50 percent of the insulation work at the refinery during the 1960's, and that the contractor was the exclusive distributor of a specific insulation product the worker saw at the refinery. (*Id.* at p. 1413.) The trial court granted a nonsuit in favor of the contractor, concluding that the worker's evidence failed to show his injuries were due to exposure to asbestos supplied by the contractor. (*Ibid.*) Reversing, the appellate court held the worker's showing constituted "circumstantial evidence . . . sufficient to support a reasonable inference of exposure." (*Id.* at p. 1420.)

In *Hernandez*, a carpenter asserted personal injury claims against the manufacturer of an asbestos-containing cement. (*Hernandez*, *supra*, 215 Cal.App.4th at pp. 664-666.) Because the carpenter died of mesothelioma shortly after the action commenced, the key witness at trial was the carpenter's brother, who testified that for 10 to 12 years, in order to earn additional income, he and the carpenter worked at construction sites on weekends. (*Ibid.*) According to the brother, during that period, he and the carpenter sometimes applied stucco to houses. (*Ibid.*) When they did so, the carpenter used the manufacturer's cement "'a lot of times,'" or "'all the time,'" and encountered visible dust as he did so. (*Id.* at p. 674.) After the trial court granted a nonsuit in favor of the manufacturer on the ground there was inadequate evidence of causation, the appellate court reversed, stating that the brother's testimony established the requisite threshold exposure. (*Ibid.*)

We conclude the Schildknegts' evidence, viewed in its totality, sufficed to show that Nicolaas suffered the requisite threshold exposure to asbestos as the result of respondents' work at the Gulf Oil refinery and the Lever Brothers plant. To begin, the evidence supports the reasonable inference that from 1967 until the mid-1980's -- that is, during the key period of Nicolaas's employment -- the two facilities used heat systems with large amounts of insulated pipe. Nicolaas testified that both facilities were "huge" with "miles of pip[e]," and that the Gulf Oil refinery employed very large heat exchangers known as "vessels" containing insulated pipes. Other evidence showed that when completed in 1951, the Lever Brothers plant incorporated a large quantity of insulated heat system pipe: approximately 97 percent of all the insulated pipe in the plant -- totaling over 60,000 linear feet -- was covered with magnesia insulation, which was used in heat systems.

Ay's testimony further supports the reasonable inference that from 1967 to the mid-1980's, a significant amount of pipe in the heat systems at the two facilities was covered with asbestos-containing insulation. Ay stated that until 1972, insulation on heat system pipes -- including magnesia insulation -- ordinarily contained asbestos; that asbestos-containing insulation was so durable that it was ordinarily replaced only when a pipe broke; and that little asbestos abatement occurred in industrial settings after 1972. That testimony established that prior to 1972, *all* the heat system pipe insulation at the two facilities -- including replacement insulation -- contained asbestos, and that after 1972, the asbestos-containing insulation was replaced only when necessary.

In view of Nicolaas's testimony, a jury could reasonably infer that respondents' activities at the two facilities exposed him to a significant amount of asbestos. According to Nicolaas, from 1967 to the mid-1980's, he saw respondents' and Bechtel's employees at his workplaces "many" times; he specifically estimated that he observed Fluor employees four or five times a year. Respondents and Bechtel were hired for "large jobs," including major projects to repair or modify a facility. At the Gulf Oil refinery, Bechtel's employees worked on the large heat exchangers; respondents' employees performed the same type of work. Respondents' and Bechtel's projects at both facilities usually required shutting down the "steam" in an entire "unit."

Nicolaas's employers took advantage of the shutdowns, and directed him to make minor repairs in the same area. Nicolaas thus worked "right next to" respondents' and Bechtel's employees for periods ranging from "a couple hours" to two days. Those employees replaced insulation and removed insulation debris, creating dusty air that Nicolass breathed. In view of the large amounts of pipe covered with asbestos-containing insulation at the two facilities, a jury could reasonably find that those activities resulted in the requisite threshold exposure to asbestos. [16]

The decisions upon which respondents rely are distinguishable. In each case, the appellate court affirmed a nonsuit or summary judgment in favor of a defendant, reasoning the plaintiff lacked sufficient evidence that the defendant's activities or products exposed the plaintiff to asbestos.[17] That

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[16] During oral argument, counsel for Fluor and Fluor Enterprises contended there was no evidence that "Fluor" employees worked on heat systems at the Gulf Oil refinery and the Lever Brothers facilities. We disagree. McKay testified that refineries typically had heat systems, and that Fluor performed refinery maintenance to enable a refinery "to get steam back on again right." Nicolaas testified that at the Gulf Oil refinery, Fluor performed the same work as Bechtel, which he described as including work on the insulation in the heating exchangers. Nicolaas further stated that Fluor replaced pipe insulation at the Lever Brothers plant, where -- according to the Schildknegts' other evidence -- virtually all of the pipe insulation contained asbestos.

[17] The decisions are: *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 251-254 [affirming summary judgment in favor of general contractor on ground plaintiff lacked evidence he was present when the general contractor's employees performed insulation work likely to release asbestos dust]; *Casey*, *supra*, 206 Cal.App.4th at pp. 1236-1239 [affirming summary judgment in favor of general contractor on ground plaintiff lacked evidence the general contractor's employees installed the asbestos-containing products later found in plaintiff's workplace]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1088-1089 [affirming summary judgment in favor of general contractor on ground plaintiff lacked evidence the general contractor performed work on asbestos-containing products while plaintiff was present]; *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282,1288-1290 [same], disapproved on another ground in *Aguilar*, *supra*, 25 Cal.4th at

is not true here. As explained above, Ay's testimony, coupled with other evidence, showed that from 1967 to the mid-1980's, the heat systems in Nicolaas's workplaces relied on pipe covered with asbestos-containing insulation. Furthermore, Nicolaas's testimony established that he often worked near respondents' employees as they replaced insulation in heat systems, that is, the systems requiring "steam" at each facility and the heat exchangers at the Gulf Oil refinery. That evidence supports the reasonable inference that respondents' activities exposed Nicolaas to significant amounts of asbestos.

b. *Substantial Factor*

We turn to respondents' alternative grounds in support of the nonsuit.[18] Respondents maintain the Schildknegts offered insufficient evidence that their conduct was a substantial factor in contributing to Nicolaas's mesothelioma. For the reasons discussed below, we disagree.

In *Hernandez*, discussed above (see pt. B.5.a., *ante*), the appellate court examined the nature of an adequate showing of causation under *Rutherford*. (*Hernandez*, *supra*, 215 Cal.App.4th at pp. 673-675.) There, in addition to

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pp. 854-855, fn. 23; *Collin v. CalPortland Company* (2014) 228 Cal.App.4th 582, 588-593 [affirming summary judgment in favor of manufacturer on ground plaintiff's discovery responses disclosed no specific facts that he encountered any asbestos-containing product made by defendant]; *Andrews*, *supra*, 138 Cal.App.4th at pp. 104-107 [same]; *McGonnell*, *supra*, 98 Cal.App.4th at pp. 1104-1105 [same]; *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 Cal.App.4th 650, 654-657 [affirming nonsuit in favor of manufacturer because plaintiff offered insufficient evidence he encountered manufacturer's specific asbestos-containing product].)

[18] The court did not grant a nonsuit on any basis other than the one discussed above. We reject respondents' suggestion that appellant has forfeited her challenges to the alternative grounds by failing to address them in her opening brief. In *Doe v. Doe 1* (2012) 208 Cal.App.4th 1185, 1193, footnote 6, which involved an appeal from the sustaining of a demurrer to a complaint without leave to amend, the appellate court rejected a similar contention asserted by the respondents there. As a motion for a nonsuit is "a demurrer to the evidence" (*Gray v. Kircher* (1987) 193 Cal.App.3d 1069, 1071-1072, italics omitted), and both sides have discussed the alternative grounds in their briefs, we find no forfeiture.

receiving evidence establishing the carpenter's threshold exposure to asbestos, the jury heard expert testimony that inhaling asbestos on multiple occasions increases the risk of mesothelioma, and that the carpenter's mesothelioma was caused by asbestos to a reasonable degree of medical certainty. (*Ibid*.) The appellate court held the evidence, viewed collectively, was sufficient to establish "substantial factor" causation under *Rutherford*. (*Hernandez*, at p. 676.) In so concluding, the court determined that nothing in *Rutherford* mandates that an expert "must expressly link" up the evidence relating to that causation or use "specific words." (*Hernandez*, at p. 675.)

The Schildknegts' evidence is materially similar to that offered to the jury in *Hernandez*. As explained above (see pt. B.5.a., *ante*), the evidence demonstrated Nicolaas's threshold exposure to asbestos due to respondents' activities at his workplaces. Aside from that evidence, Dr. Dahlgren stated that because even low levels of asbestos exposure enhance the risk of mesothelioma, a person inhaling dust created by others working nearby on asbestos-containing insulation suffers a risk-enhancing dose of asbestos. Both Dahlgren and Brody stated that to a reasonable degree of medical certainty, exposure to asbestos causes mesothelioma. Under *Hernandez*, that evidence sufficed to establish substantial factor causation.

Respondents contend the Schildknegts' evidence did not satisfy a specific requirement purportedly imposed in *Rutherford* on the showing of causation. While discussing the propriety of burden-shifting instructions on causation, the court suggested that the length, frequency, and intensity of an individual's exposure to an asbestos-containing product may be relevant to the causation of cancer.[19] Pointing to those remarks, respondents assert that

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[19] In describing the scientific uncertainties attending the causation of cancer, the court asked rhetorically: "Taking into account the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (e.g., other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a 'substantial factor' in causing the cancer?" (*Rutherford*, *supra*, 16 Cal.4th at p. 975.) Later, the court observed a burden-shifting instruction on causation might be

in order to prove substantial factor causation, plaintiffs must demonstrate an exposure to asbestos greater than a mere "threshold" exposure. They argue that even if the Schildknegts established the requisite threshold exposure, they failed to show Nicolaas's exposure to asbestos through their activities was sufficiently lengthy, intense, and frequent to support the inference that it was a substantial factor contributing to the risk of cancer.

In our view, *Rutherford* imposes no such independent requirement regarding the evidence of asbestos exposure needed to demonstrate substantial factor causation. In *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477 (*Davis*), this court rejected a similar contention. There, the plaintiff asserted personal injury claims against a brake lining manufacturer on behalf of her father, alleging that he developed mesothelioma as a result of exposure to asbestos dust from the brake linings. (*Id*. at pp. 479-482.) At trial, the plaintiff offered expert testimony from a pathologist, who stated that very low doses of asbestos can result in mesothelioma, and that each dose "adds to the previous exposures." (*Id*. at p. 483.) Responding to a hypothetical question, the expert opined that the mechanic's exposure to asbestos through his activities with the brake linings was a substantial contributing factor to his mesothelioma. (*Ibid*.)

After a jury returned a verdict in favor of the plaintiff, the manufacturer challenged the expert's testimony on appeal, arguing that under *Rutherford*, a causation analysis must be based on an estimate of how great a dose was received, which was not offered at trial. (*Davis*, *supra*, 245 Cal.App.4th at pp. 492-493.) In rejecting that challenge, we stated: "*Rutherford* does not require a 'dose level estimation.' Instead, it requires a determination, to a reasonable medical probability, that the plaintiff's (or decedent's) exposure to the defendant's asbestos-containing product was a substantial factor in contributing to the risk of developing mesothelioma. [Citation.] The *Rutherford* court itself acknowledged that a plaintiff may satisfy this requirement through the presentation of expert witness

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appropriate in special circumstances, namely, "after the plaintiff had proven . . . [a] sufficiently lengthy, intense and frequent exposure as to render the defendant's product a substantial factor contributing to the risk of cancer." (*Id*. at p. 979.)

testimony that 'each exposure, even a relatively small one, contributed to the occupational "dose" and hence to the risk of cancer.' [Citation.]" (*Ibid.*, quoting *Rutherford, supra*, 16 Cal.4th at pp. 976-977, 984.)

The rationale in *Davis* also applies here. Although *Rutherford* mandates a showing of a threshold exposure to asbestos, it does not impose an independent requirement targeting the evidence of exposure necessary to demonstrate substantial factor causation; just as *Rutherford* requires no dose level estimation, it requires no specific showing regarding the length, intensity, or frequency of the exposure. *Rutherford* requires only that the testimony from a plaintiff's experts, coupled with the plaintiff's other evidence, suffices to demonstrate substantial factor causation. As explained above, the Schildknegts satisfied that requirement.

c. *Fluor and Fluor Enterprises*

Fluor and Fluor Enterprises contend the Schildknegts failed to identify either of them as a party liable for their injuries. We disagree.

The Schildknegts' evidence sufficed to show that Fluor was responsible for Nicolaas's exposure to asbestos at the Gulf Oil refinery between 1967 and 1972, and that Fluor Enterprises was responsible for his exposure to asbestos at the Lever Brothers plant from 1972 to the mid-1980's. According to that evidence, after 1924, Fluor was contractor until late 1971, when it decided to establish Fluor Enterprises. After 1971, Fluor Enterprises was Fluor's wholly-owned subsidiary, and acted as the primary "Fluor" engineering, procurement, and construction entity. At the time of trial, Fluor did not engage in contracting services, but was a holding company that owned interests in five subsidiaries -- including Fluor Enterprises -- and their subsidiaries.

Although the record mentions several "Fluor" entities, only Fluor and Flour Enterprises are identified as engaged in contracting services in Southern California during the pertinent period. Because Fluor's interrogatory responses stated that "since it began its operations, [it] has been an engineering and construction contractor," a jury could reasonably find that its personnel worked at the Gulf Oil refinery from 1967 to 1972, as Fluor's home office was then in Los Angeles, and Fluor Enterprises had not been created. Furthermore, because Fluor Enterprises had an office in

California, a jury could reasonably find its personnel worked at the Lever Brothers plant from 1972 onwards. Accordingly, there is sufficient evidence to establish Fluor and Fluor Enterprises as parties liable for the Schildknegts' injuries.[20]

d. *Standard of Care*

Respondents contend the Schildknegts offered no expert testimony sufficient to establish the standard of care applicable to firms engaged in construction and engineering, for purposes of the negligence claims against them. As explained below, we conclude there was sufficient evidence regarding that standard of care.

Generally, "'[n]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997 (*Flowers*), quoting Rest.2d Torts, § 282.) Under that principle, independent contractors hired to perform work may be subject to liability for injury to unrelated third parties present during the work. (*Hall v. Barber Door Co.* (1933) 218 Cal. 412, 419 (*Hall*); *Chance v. Lawry's, Inc.* (1962) 58 Cal.2d 368, 378-379; see *Sanchez v. Swinerton & Walhberg Co.* (1996) 47 Cal.App.4th 1461, 1470.) Because the application of the principle "is inherently situational, the amount of care deemed reasonable in any particular case will vary." (*Flowers*, *supra,* 8 Cal.4th at p. 997.) In the case of professionals, their specialized education and training ordinarily constitute factors relevant to the amount of care reasonable in a particular situation. (*Ibid.*)

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[20] In view of Nicolaas's testimony that he frequently saw "Fluor" employees at each facility and worked near them when they created insulation dust, we conclude the Schildknegts have produced evidence sufficient to establish substantial factor causation with respect to the Fluor entity associated with each facility. (See *Ganoe*, *supra*, 227 Cal.App.4th at pp. 1584-1585 [plaintiff's evidence that he worked near contractor creating asbestos dust during single project was sufficient to support inference that he could show substantial factor causation, for purposes of opposing contractor's "'no evidence'" summary judgment motion].)

Expert testimony is thus usually required to establish the amount of care demanded of a professional in a specific factual context, absent special circumstances. (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 138 (*Sanchez*).) One such exception arises when a statute determines the requisite amount of professional care, for purposes of a claim of negligence per se.[21] (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1423-1424.) As explained in *Sanchez*, another exception exists when "the circumstances fall within the realm of common knowledge," that is, when "[a] lay person's common knowledge includes the conduct required by the particular circumstances.' [Citation.]" (*Sanchez*, *supra*, 204 Cal.App.4th at p. 138.) There, we concluded no expert testimony was needed to show a health worker was negligent in permitting an elderly woman under her care to smoke in bed, in view of the fire hazard that conduct presented. (*Id*. at pp. 138-139.)

The latter exception is also applicable here, as the essential misconduct appellant ascribes to respondents requires no detailed knowledge relating to respondents' expertise. Appellant contends that in view of the California industrial order issued in the 1930's and the 1972 federal OSHA regulations, the respondents knew, or should have known, that asbestos was hazardous, yet they did nothing to protect Nicolaas at the Gulf Oil refinery and the Lever Brothers plant between 1967 and the mid-1980s.

In our view, it takes no expert testimony to establish that independent contractors who know their work causes hazardous dust must take obvious measures to protect nearby persons, for example, by issuing a warning or advising those persons to leave the area. (See *Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 519-520 (*Leonard*) [no expert testimony necessary to establish that hospital and its medical staff did not exercise reasonable care by failing to count clamps removed after surgery, as

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[21] "'[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.' [Citation.] The doctrine of negligence per se does not provide a private right of action for violation of a statute. [Citation.]" (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 555-556, quoting *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353, fn. 2; Evid. Code, § 669.)

that safety measure was within ken of average layperson].) Generally, "an independent contractor, who by his own negligence creates dangerous conditions during the progress of the work, [is] responsible for an injury occasioned by those conditions to one rightfully on the premises." (*Hall*, *supra*, 218 Cal. at p. 419.) Furthermore, a regulation may give a regulated business adequate notice that a substance is hazardous, for purposes of establishing that the business engaged in "ordinary" negligence in handling the substance. (*People v. Martin* (1989) 211 Cal.App.3d 699, 703, 706-707, ["'Where as here dangerous substances are involved, and the probability of regulation is great, the trier of fact may infer knowledge on the part of those engaged in the business of using such substances. [Citation.]'"], quoting *State v. McAllister* (Minn.Ct.App.1987) 399 N.W.2d 685, 689].)

Here, the Schildknegts' evidence showed that between 1972 and the mid-1980's, while Nicolaas worked at the Lever Brothers plant, respondents knew asbestos dust was hazardous, in view of the 1972 federal OSHA regulations. McKay and Herbert expressly testified that "Fluor" acquired that knowledge from the OSHA regulations. As Parsons's Siegler testified that by 1974, Parsons knew asbestos caused lung cancer, and it complied with all federal and state regulations regarding asbestos, a jury could also reasonably infer Parsons knew asbestos dust was hazardous no later than the promulgation of the 1972 OSHA regulations.

The Schildknegts' evidence further supports the reasonable inference that from 1967 to 1972, while Nicolaas worked at the Gulf Oil refinery, respondents knew asbestos dust was potentially hazardous due to the California industrial order, notwithstanding McKay's and Herbert's testimony that "Fluor" then lacked that knowledge. McKay and Herbert testified that "Fluor" had a legal department as early as 1960, that it ascertained the laws of the states in which it worked, and that it tried to be "at the forefront of worker safety." Siegler stated that as of 1974, Parsons was one of the largest construction and engineering firms in the world, and that it incorporated federal and state safety regulations into its contracts. In view of that testimony, a jury could reasonably infer that even before 1967, respondents knew the California industrial order identified asbestos dust as potentially hazardous. The Schildknegts' evidence thus suffices to show that

during Nicolaas's employment at the two facilities, respondents were obliged to take -- at a minimum -- obvious common sense measures to protect him from that dust.

Respondents' reliance upon *Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022 (*Evans*) is misplaced. There, the plaintiff -- a pipeline repairman long employed by a gas company -- asserted negligence claims against independent contractors, alleging that his asbestosis resulted from their activities. (*Id.* at pp 1025-1026.) At trial, the evidence showed that the gas company hired the contractors to engage in large-scale pipeline installation and repair projects. (*Id.* at p. 1027.) The plaintiff worked side-by-side with the contractors, and inspected their work for compliance with the gas company's specifications. (*Ibid.*) During the pertinent period, gas delivery pipes had an asbestos coating. (*Ibid.*) Both sides called witnesses with expertise in gas pipelines, including experts regarding "'the standard of care and . . . the state of the art.'" (*Id.* at p. 1052.) Later, the trial court instructed the jury that the applicable standard of care was that of a "reasonably careful construction contractor," as established by the testimony of the expert witnesses. (*Id.* at p. 1037.) On appeal, the plaintiff contended the instruction improperly imposed a professional standard of care. (*Id.* at p. 1050.) We concluded the trial court did not err in giving the instruction in view of "the extensive evidence . . . about the very specialized profession of building and repairing gas pipelines." (*Id.* at p. 1052.)

Evans thus examined a question distinct from that before us, namely, whether a professional standard of care was properly imposed under the issues and evidence presented there. In contrast, respondents maintain that such a standard of care is mandated here. For the reasons explained above, that is not the case, as no expert testimony is necessary to identify common sense measures to protect Nicolaas who -- unlike the plaintiff in *Evans* -- did not inspect or oversee respondents' work.

The other decisions upon which respondents rely are also distinguishable. In each case, the issue of negligence hinged on whether an independent contractor exercised due care in resolving technical questions

regarding a construction project.[22] As explained above, that is not the issue here.

Respondents contend the Schildknegts presented no evidence they violated any state or federal regulation or engaged in work exceeding the maximum levels of permissible asbestos exposure set in those regulations. However, the absence of such evidence, though potentially fatal to a theory of negligence per se, is irrelevant to the theory of negligence set forth above, which relies on state and federal regulations only to demonstrate respondents' knowledge that asbestos dust was hazardous, and not to establish specific protective measures.

Respondents also suggest they did not fail to exercise due care because they acted no differently than anyone else during the relevant period. We disagree. When a professional does not implement an obvious safety measure for which expert testimony is unnecessary, the professional does not necessarily escape liability for negligence merely by pointing to evidence that no other professional employed that measure. (*Leonard*, *supra*, 47 Cal.2d at pp. 519-520.)

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[22] Those decisions are: *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702-703 [expert testimony necessary to establish whether contractor adequately designed and built home to withstand flooding]; *Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [expert testimony necessary to establish whether contractor installed adequate waterproofing in home]; *Swett v. Gribaldo, Jones & Associates* (1974) 40 Cal.App.3d 573, 575 [expert testimony necessary to establish soils engineer adequately evaluated stability of construction site]; *Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 858 [expert testimony necessary to establish whether engineering firm adequately designed pier]; *Huang v. Garner* (1984) 157 Cal.App.3d 404, 413 [expert testimony unnecessary to establish whether defendants adequately designed and engineered building, as sufficient evidence established negligence per se], disapproved on another ground in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 648-649.)

C. *Conclusion*

In reversing the grant of summary judgment for Buffalo and the grant of a nonsuit for respondents Parsons, Fluor, and Fluor Enterprises, we do not suggest the Schildknegts' case against them was a strong one. Indeed, the defense verdicts rendered for the other defendants at trial suggest otherwise. Nonetheless, our duty is not to preempt the role of the trier of fact. The Schildknegts' pretrial showing was sufficient to create triable issues of fact whether Nicolaas was exposed to asbestos from Buffalo-manufactured pumps and Buffalo-supplied replacement parts; the evidence at trial was sufficient to permit a reasonable factfinder to conclude the remaining respondents' conduct negligently subjected Nicolaas to asbestos sufficient to constitute a substantial factor in the causation of his mesothelioma. Accordingly, we must reverse both the grant of summary judgment and the grant of the nonsuit.

DISPOSITION

The judgments in favor of Buffalo, Parsons, Fluor, and Fluor Enterprises are reversed, and the matter is remanded for further proceedings in accordance with this opinion. Appellant is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.